Supreme Court, U.S.
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No. 04 - _____

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
ANN GAY; JAYNE McCABE,

Petitioners,

v.

LINCOLN TECHNICAL INSTITUTE, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Higher Education Act allows proprietary schools (for-profit companies) to participate in the government insured student loan and educational grant programs on the condition that the school agrees that it will not compensate its recruiters, directly or indirectly, based on the number of students they enroll. The statutory language prohibiting the payment of incentive compensation to recruiters must be recited verbatim in the program participation agreement of each proprietary school as a condition of eligibility for students attending the school to obtain insured loans and grants in order to pay tuition.

The United States Court of Appeals for the Fifth Circuit now adds the new requirement that statutes setting forth conditions for receiving money from the federal treasury must explicitly state that compliance is a condition of payment to allow for a cause of action under the False Claims Act.

The Fifth Circuit's decision creates a new and heavy obstacle to the Government's collection of federal dollars paid to ineligible recipients. This new element has dangerous ramifications across the vast reach of U.S. Government contracts and programs. The circuit court's unprecedented reasoning eviscerates the Government's right to collect money on all contracts where the magic language is missing. The decision will create a major road block to the ability to collect on an untold number of existing Government contracts.

1. Whether the statutory language setting forth the conditions of eligibility in the Higher Education Act, which must be recited verbatim in the program participation agreements of every proprietary school that receives federally insured student loans and grants from its students, is sufficient to state a cause of action under the False Claims Act? 20 U.S.C. 1094(a).

2. Whether federally insured student loans and educational grants are "claims for payment" as to the school that receives such money from its students, and can thus be recovered from the school under the False Claims Act in cases when the school violates the Higher Education Act eligibility requirements?

CORPORATE DISCLOSURE STATEMENT

Back-to-School Acquisitions, L.L.C. purchased 90% of the stock of Lincoln Technical Institute, Inc. on June 21, 1999. Stonington Capital Appreciation Fund, L.P. is 100% owner of Back to School Acquisitions, LLC. P.J. Santagnelo is chief executive officer Lincoln. David F. Carney, Hugh Evans, Miryam Knutson, Alexis P. Michas, Steven Hart, Lawrence Brown serve on Lincoln's board of directors. Dixon, Odom & Co., L.L.P. is certified public accountants to Lincoln.

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IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ex rel.
ANN GAY; JAYNE McCABE, *Petitioners*,
v.

LINCOLN TECHNICAL INSTITUTE, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

OPINIONS BELOW

The September 3, 2003 Opinion and Order of the United States District Court for the Northern District of Texas is reported at *United States of America, ex rel. Ann Gay and Jayne McCabe v. Lincoln Technical Institute, Inc.*, 2003 U.S. Dist. LEXIS 25968, 2003 WL 22474586. App. 3a. The October 15, 2004 Opinion of the Fifth Circuit Court of Appeals on the merits is unreported. App. 1a. No petition for rehearing was filed.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its decision on October 15, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) to review the circuit court's decision on a writ of certiorari.

RELEVANT PROVISIONS

This case involves the False Claims Act, 31 U.S.C. 3729-3733. Section 3729 is set out in Petitioner's Appendix at 10a.

Article I, section 9, clause 7 the Constitution provides:

"No money shall be drawn from the Treasury, but in consequence of appropriations made by law."

The Higher Education Act, 20 U.S.C. 1094(a)(20), provides:

"1094. Program participation agreements

(a) Required for programs of assistance; contents. In order to be an eligible institution for the purposes of any program authorized under this title, an institution must be an institution of higher education or an eligible institution (as that term is defined for the purpose of that program) and shall ... enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following:

* * *

(20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except that this paragraph shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance."

STATEMENT OF FACTS

The False Claims Act.

The False Claims Act[1] prohibits the submission of false or fraudulent claims for payment to the United States or the making

[1] 31 U.S.C. 3729, *et seq.*,

of false statements for the purpose of *causing* a false claim to be paid. A violation of the False Claims Act occurs, among other things, when a person "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval,"[2] or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."[3] In addition, the FCA prohibits a variety of related deceptive practices involving government funds and property.[4]

Suits to collect statutory damages and penalties may be brought either by the Attorney General of the United States, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* suit.[5] When a *qui tam* action is filed, the government may intervene and take over the case.[6] If the government declines to intervene, the relator conducts the litigation, and if a *qui tam* suit results in civil penalties, those penalties are divided between the government and the relator.[7]

The Higher Education Act of 1965.

Under Title IV of the Higher Education Act of 1965[8], Congress established a number of different student loan and grant programs, including the Federal Pell Grant Program ("Pell") and the Federal Family Education Loan Program ("FFELP"). Although the precise mechanism by which Title IV funds are disbursed to eligible schools under these programs varies, each requires compliance with specific requirements as a prerequisite to obtaining federal funds. Thus, in order to become "eligible" to receive Title IV funds under these programs, a school must first enter into a program participation agreement which "shall

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[2] 31 U.S.C. 3729(a)(1).

[3] 31 U.S.C. 3729(a)(2).

[4] 31 U.S.C. 3729(a)(3)-(7).

[5] 31 U.S.C. 3730(a) and (b)(1). *See also Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769-78 (2000).

[6] 31 U.S.C. 3730(b)(2).

[7] 31 U.S.C. 3730(d).

[8] Pub. L. No. 89-329, 79 Stat. 1219.

condition the initial and continuing eligibility of the school to participate in a program upon compliance with" specific requirements. 20 U.S.C. 1094(a).[9]

The principal statutory requirement at issue in this case is that schools:

will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any person or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance.

20 U.S.C. 1094(a)(20). The governing statute makes clear that the initial and continuing eligibility of schools to obtain Title IV funding depends on a requirement that the schools not pay certain types of commissions. This statutory mandate is known commonly as the incentive compensation ban.

Congress enacted the prohibition against paying commissions, bonuses, or other incentive payments based on success in recruiting students because it determined that such payments were associated with high loan default rates, which in turn resulted in a significant drain on program funds where the government acts as a loan guarantor. When Congress amended the Higher Education Act in 1992 to prohibit schools from paying recruiter incentives, more than half of all federal education dollars were going to pay

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[9] To maintain their eligibility to receive Title IV funds, educational institutions must also provide DOE with an annual compliance audit and financial statements prepared by independent auditors. 20 U.S.C. 1094(c)(1)(A); 34 C.F.R. 668.23. These audit reports are then used to determine whether schools are adhering to applicable requirements for funding, including the incentive compensation ban.

defaulted student loans, and there was serious concern the student loan program would go broke is the fraud was not curtailed.[10]

Under the FFELP, which includes Stafford Loans, the guaranty agency makes the eventual claim for payment by the United States. The school and student submit an application to a private lender for a loan on behalf of the student. Notably, in the portion of the student's promissory note submitted to a private lender, schools are required to certify that the student/borrower is making satisfactory progress in a program that is eligible for the loan type(s) certified, and that the student is an eligible student under the Title IV program. Schools are also required to enter a School Code on that form, which they will have only if they have previously signed a program participation agreement promising compliance with all Title IV eligibility requirements. If a student defaults in repaying a FFELP loan, a state guaranty agency reimburses the lender or the subsequent holder of the loan for the outstanding balance and takes assignment of the loan for collection action.[11] If, in turn, the guaranty agency is unable to collect from the borrower, DOE reimburses the guaranty agency for the loss it incurred in honoring the defaulted claims[12], and DOE may, in its discretion, also take assignment of the loan.[13] In this way, the government is ultimately called upon to satisfy claims for payment as of right.

Facts Material to the Questions Presented

The instant case involves a *qui tam* suit filed against Lincoln, a proprietary school that teaches auto mechanics and charges $28,000 in tuition, more than 80% of which is paid from Title IV funds. The relators, Ann Gay and Jayne McCabe (enrollment

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[10] S. Rep. No. 58, 102d Cong., 1st Sess., (1991) ("Abuses in Federal Student Aid Programs"); H.R. Rep. No. 447, 102d Cong., 2d Sess., at 10, *reprinted in* 1992 U.S.C.C.A.N. 334, 343 (noting new provisions that "include prohibiting the use of commissioned sales persons and recruiters").

[11] 34 C.F.R. 682.401(b)(14).

[12] 20 U.S.C. 1078(c)(1)(A).

[13] 20 U.S.C. 1078(c)(8).

counselors at Lincoln), allege that Lincoln falsely certifies each year that it is in compliance with the incentive compensation ban while intentionally and knowingly violating that requirement. Relators allege that these false representations, coupled with later claims for payment of Title IV funds, constitute false claims under 31 U.S.C. 3729(a)(1), (a)(2) & (a)(7). Jurisdiction in the district court was asserted under under 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331.

Relators allege, *inter alia*, that Lincoln falsely promises to comply with the incentive compensation ban in PPAs it submits to DOE, and that Lincoln fraudulently induces the Government to approve and/or pay out the Title IV funds, based on its false promises to comply with the incentive compensation ban. Relators also allege that the "promises when made are false. And, relators further allege that Lincoln every year also falsely asserts compliance with the incentive compensation ban in 'management assertion letters' written by Lincoln management for an annual compliance audit.

In addition to Lincoln's alleged false representations concerning its eligibility to receive Title IV funds, relators allege that Lincoln submits a variety of "claims" to the federal government for funds that Lincoln knows to be false based upon its non-compliance with the incentive compensation ban. For example, relators allege that Lincoln submits requests for Pell Grant funds directly to DOE, which transfers those funds "directly into a Lincoln account," and that Lincoln knows it is ineligible for those funds based on its violations of the incentive compensation ban. Relators also allege that Lincoln submits requests for government-insured loans to private lenders and that Lincoln knows it is ineligible for these funds based on its intentional violations of the incentive compensation ban.

The court first rejected the relators' argument that Lincoln could be held liable under the FCA on an "implied certification" theory (*e.g.*, that all claims for the payment of Title IV funds submitted to DOE included an implied certification that Lincoln was in compliance with the terms of its PPA). The court stated that a false certification of compliance with applicable law only gives rise to an FCA claim if certification of compliance with

a particular statute is a prerequisite to obtaining a government benefit. The court rejected the argument that 20 U.S.C. 1094(a) imposed a certification requirement, *i.e.*, a promise to comply with a condition of payment. In addition, the court rejected the relators' FCA claims under a "promissory fraud" theory, stating that promissory fraud is only actionable where a claimant makes a "false certification" that it will comply with a particular law when such certification is a prerequisite for the receipt of federal funds. Likewise, the court rejected the relators' argument that Lincoln's statements of compliance with the incentive compensation ban in letters written for independent auditors could qualify as actionable false claims because relators identify no statute or regulation which makes any certification in these letters a prerequisite to the receipt of federal funds.

REASONS FOR GRANTING THE WRIT

Question 1. Whether the conditions of eligibility in the Higher Education Act, which must be recited verbatim in the program participation agreements of every proprietary school whose students receive federally insured student loans and grants, is sufficient to state a cause of action under the False Claims Act?

The Higher Education Act prohibits the payment of incentive compensation to recruiters as a condition of eligibility. The incentive compensation restriction is material as a matter of law because it is an express limitation by Congress on how Government funds may be spent.[14] Materiality necessarily begins with the basic constitution principle that the Appropriations Clause gives Congress control over all federal spending.[15] The

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[14] *OPM v. Richmond*, 496 U.S. 414, 428 (1990) ("[P]ublic funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents or the individual pleas of litigants.").

[15] "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."Art. I, Sec. 9, Cl. 7.

constitutional limitation is absolute, and forbids payment of Government funds contrary to the conditions imposed by Congress when it appropriates the funds.[16] Congress has the exclusive power to control all federal spending, no executive department may exercise those functions in the absence of Congressional authorization. "The oft-quoted observation in *Rock Island, A.& L.R. Co. v. United States*, 254 U.S. 141, 143, 65 L.Ed. 188, 189, 41 S.Ct. 55 that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the condition defined by Congress for charging the public treasury."[17] The burden is on the recipient of Government money to establish their eligibility to participate in the program.[18]

The False Claims Act has a materiality requirement.

The purported distinction made by the Fifth Circuit between conditions of participation and conditions of payment was squarely rejected by the Third Circuit.[19] To relegate the statute to a mere condition of participation in the program on the ground there is no express statement in the statute that disbursement of funds depends on certification of compliance with the incentive compensation ban as the basis for determining liability under the False Claims Act will eliminate the Government's ability to collect on entire categories of contracts. The Fifth Circuit conflicts with

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[16] This provision "was intended as a restriction upon the disbursing authority of the Executive department ...." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

[17] *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).

[18] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63 (1984) ("Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law.").

[19] *United States ex rel. Quinn v. Omnicare, Inc.*, 382 F.3d 432, 441-43 (3d Cir. 2004) (even if a statute "does not expressly condition payment on compliance with its terms, it hardly can be said that non-compliance with its terms is 'irrelevant to the government's disbursement decision.'").

this Court in adding a new element to the False Claims Act that requires statutes appropriating federal money to explicitly state that the condition is a prerequisite to payment in order to be actionable. The decision leaves the Government without remedy to recover defaulted student loans and educational grants from ineligible schools if suit cannot be brought under the False Claims Act.

In circumstances where federal programs provide benefits in a two-step process – where the company is initially required to make express representations concerning its eligibility to receive government benefits and later submits (or causes others to submit) claims for payment that do not expressly reiterate those initial promises, several circuits have held that a claim for payment submitted under such a program constitutes an "implied certification" of compliance with those requirements, and that such a claim is therefore "false" when the prerequisites for obtaining the benefit have not been satisfied.[20] In those cases, eligibility to receive government benefits under the federal program was expressly conditioned and depended on compliance with the statutory or regulatory requirements initially agreed to. Second, other courts have held that a person who falsely promises to comply with conditions on the receipt of government benefits may be held liable under the FCA on a theory of "promissory fraud," so long as the initial promise was "false when made."[21]

As explained above, the Higher Education Act of 1965

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[20] *See United States ex rel. Quinn v. Omnicare, Inc.*, 382 F.3d 432, 441-43 (3d Cir. 2004); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 414-15 (6th Cir. 2002); *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001); *United States ex rel. Siewick v. Jamieson Science & Engineering, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000); *Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 519, 531-33 (10th Cir. 2000); Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 433-34 (Ct. Fed. Cl. 1994), aff'd mem., 57 F.3d 1084 (Fed. Cir. 1995).

[21] *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997) (a false certification of compliance with mandatory requirements "creates liability when certification is a prerequisite to obtaining a government benefit.").

expressly conditions eligibility to receive Title IV funds on compliance with numerous statutory requirements, including the incentive compensation ban, and requires schools to enter program participation agreements in which they agree to comply with these requirements. Compliance with these requirements is plainly a prerequisite to obtaining a government benefit, and all subsequent claims for payment by Lincoln under the program may properly be deemed to include an implied certification of compliance with these requirements. In this case, relators have stated a claim under the FCA by alleging that Lincoln's claims for Pell Grant funds include both express and implied statements of compliance with all requirements for the receipt of Title IV funds. Likewise, by alleging that Lincoln's promises to comply with the incentive compensation ban were false when made, the relators have stated a claim based on a theory of promissory fraud to the extent these initial false statements caused the later submission of claims for payment.

Question 2. Whether federally insured student loans and educational grants made to students who attend proprietary schools are "claims for payment" as to the school that receives such money from its students, and can thus be recovered from the school under the False Claims Act in cases when the school violates the Higher Education Act eligibility requirements?

No matter how a claim is ultimately submitted to the government, however, the disbursement of federal funds rests on required statements of eligibility made by schools that were necessary for requests for payment to be considered. Such statements thus directly or indirectly cause the submission of all subsequent claims for payment. After a school becomes eligible to receive Title IV funds by entering into a PPA, claims for payment of those funds can be made in various ways. Under the Pell Grant program, students submit requests for funding directly to DOE, or to DOE with the assistance of schools, while under the FFELP, students and schools jointly submit requests for loans to private lenders which are guaranteed by state guaranty agencies that are, in turn, insured by DOE and paid only in the event of a default.

A violation of the False Claims Act occurs when a person "knowingly presents, or causes to be presented" to

the government "a false or fraudulent claim for payment or approval[22], or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."[23] The FCA defines the term "claim" broadly to include "any request or demand, whether under a contract *or otherwise*, for money or property which is made to a contractor, *grantee, or other recipient.*[24]

Consistent with this broad definition of "claim," the Court has held that the FCA extends to false statement made in applications for government loans, because the Act "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money."[25] The legislative history of the 1986 amendments to the FCA confirms this broad interpretation, and states further that "claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program."[26]

As noted, a person may be liable under Sections 3729(a)(1) & (a)(2) of the FCA not only for submitting a false claim directly

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[22] 31 U.S.C. 3729(a)(1).

[23] 31 U.S.C. 3729(a)(2).

[24] 31 U.S.C. 3729(c) (emphases added).

[25] *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968).

[26] S. Rep. No. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

to the government but also for *causing* another to submit a false claim.[27] Likewise, numerous courts have held that persons who cause loan applicants to provide false information to the government in applications for guaranteed loans may be held liable under the FCA where the government pays money upon default by the borrowers. Although a loan guarantee, by itself, is not a "claim for payment" under the FCA[28], payment by the Government following a default is actionable under the FCA.[29]

The Fifth Circuit holding that defaulted student loans paid by the Government and educational grants paid to students are not "claims for payment" as to the ineligible schools that receive such funds from students is an unduly narrow reading of the False Claims Act, and contrary to the decisions of this Court.

CONCLUSION

The Fifth Circuit's new requirement in False Claims Act cases that statutes setting forth conditions for receiving money from the federal treasury must explicitly state that compliance is a condition

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[27] *United States v. Bornstein*, 423 U.S. 303, 309 (1976) (noting that FCA "gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541-45 (1943) (holding electrical contractors who rigged bids on municipal contracts funded by federal government liable for causing municipalities to submit false claims); *Tanner v. United States*, 483 U.S. 107, 129 (1987) (noting prior cases in which the Court "recognized that the fact that a false claim passes through the hands of a third party on its way from the claimant to the United States does not release the claimant from culpability under the Act"). The Ninth Circuit has specifically recognized that "a person need not be the one who actually submitted the claim forms in order to be liable." *United States v. Mackby*, 261 F.3d 821, 827 (9th Cir. 2001)

[28] *United States v. McNinch*, 356 U.S. 595 (1958).

[29] *See e.g., United States v. Rivera*, 55 F.3d 703, 709-10 (1st Cir. 1995); *United States v. Veneziale*, 268 F.2d 504 (3d Cir. 1959).

of payment creates an obstacle to the Government's collection of federal dollars paid to ineligible recipients. This unprecedented decision eviscerates the Government's right to collect money on all contracts where the magic language is missing, and will disrupt Government's efforts to collect money paid to ineligible recipients in unforeseen ways.

For these reasons and those set forth above, the petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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(713) 528-5409

Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11138

UNITED STATES OF AMERICA,
ex rel. Ann GAY and Jayne McCabe

Plaintiffs-Appellants

versus

LINCOLN TECHNICAL INSTITUTE, INC.,
Defendant-Appellee

Appeal from the United States District Court for
the Northern District of Texas
(Civ. A.301CV505K)

Before DeMOSS, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

In this False Claims Act case Relators Ann Gay and Jayne McCabe sued Lincoln Technical Institute, Inc. ("Lincoln") alleging violations of the False Claims Act, 31 U.S.C. §3729, *et seq*. Lincoln participated in federal student financial aid programs under Title IV of the Higher Education Act of 1995, 20 U.S.C. §1078, *et seq*. Under these programs the United States Government insured educational loans and made direct educational grants to students enrolled at Lincoln. Title IV, Part G, §487(a)(20) of the

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

HEA prohibits participating educational institutions such as ITT from making commission or incentive payments to admissions or recruitment personnel based on success in securing enrollments or financial aid to students. Relators allege that Lincoln falsely promised that Lincoln would comply and certified that Lincoln had complied with this regulation.

In its memorandum and order, *United States ex rel. Gay v. Lincoln Technical Institute, Inc.*, 2003 WL 22474586 (N.D. Tex. Sept. 3, 2003), the district court dismissed Relators' complaint for failure to state a claim upon which relief can be granted. Having reviewed the record and fully considered the parties' respective briefing and arguments, we AFFIRM the district court's judgment for essentially the same reasons as well stated in its memorandum opinion and order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, *ex rel.* ANN GAY and JAYNE McCABE,	§	
	§	Civil No. 3:01-CV-505-D
Plaintiffs,	§	
	§	
v.	§	
	§	
LINCOLN TECHNICAL INSTITUTE, INC.,	§	
	§	
Defendant.	§	
	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Lincoln Technical Institute Inc.'s Motion to Dismiss Relators' First Amended Complaint. For the reasons stated below, the Court **GRANTS** Defendant's motion.

I. Factual Background

Lincoln is a private, for-profit, vocational school. The two Relators formerly worked at Lincoln's campus in Grand Prairie, Texas, as admissions representatives. Relators allege that from 1993 through the time the Complaint was filed, Lincoln paid its admissions/recruitment representatives salaries that were directly tied to enrollment quotas. Recruiters who failed to meet their minimum quotas were allegedly terminated for failing to convert a minimum percentage of leads into enrollments. Recruiters who exceeded their quotas were given raises. Enrollment quotas were set for each Lincoln campus by its director of admissions, and admissions directors failing to meet their campus enrollment quotas were also fired from their jobs.

During the years at issue, Lincoln executed various Program Participation Agreements ("Agreements") with the United States Department of Education ("DOE") relating to Lincoln's participation in federally guaranteed loan programs and federal educational grant programs administered by the DOE under Title IV of the Higher Education Act of 1965 ("HEA"). 20 U.S.C. § 1078, et seq. Relators allege that almost 80% of Lincoln's revenues for fiscal years 1994 through 2001 was derived from these programs. Execution of the Agreements was a mandatory condition of Lincoln's participation in the federal student loan programs at issue.

The HEA provides that, with certain exceptions not relevant here, institutions participating in Title IV educational assistance programs "will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. § 1094(a)(20). The Agreements required Lincoln to agree to abide by that prohibition.

Lincoln's management was required to submit assertion letters to its compliance auditor stating that the school complied with the requirements of participation in HEA student loan programs, including incentive compensation prohibitions. These assertion letters were allegedly transmitted to the government either by being physically included with, or re-stated in, the auditor's reports, which were in turn required to be submitted to the DOE under the applicable rules and audit guidelines. Relators identify five dates on which such compliance audit reports were allegedly submitted to and received by the DOE.

II. Standard of Review

A court may dismiss a complaint under Rule 12(b)(6) if it is clear that no relief could be granted under any set of facts which could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). In deciding a Rule 12(b)(6) motion, the Court must accept the factual allegations of the complaint as true. Green v. State Bar of Texas, 27 F.3d 1083, 1086 (5th Cir. 1994). But, the Court

need not accept as true conclusory or inferential allegations which are contradicted by the facts pleaded or set out in the exhibits attached to or incorporated in the pleading. See *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (conclusory allegations or legal conclusions appearing as factual conclusions not sufficient to prevent motion to dismiss).

III. The False Claims Act

The False Claims Act provides for restitution to the government of money taken by fraudulent means. United States ex rel. *Marcus v. Hess*, 317 U.S. 537, 87 L. Ed. 443, 63 S. Ct. 379 (1943). Liability under the False Claims Act occurs when a person or entity:

> 1.knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> 2. knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> 3.conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . . or
>
> 7.knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

31 U.S.C. § 3729(a) [irrelevant subsections omitted].

For purposes of the False Claims Act, "knowing" and "knowingly" mean that a person, with respect to information:

> 1. has actual knowledge of the information;
>
> 2. acts in deliberate ignorance of the truth or falsity of the information; or

3. acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b). The False Claims Act does not, however, define "false or fraudulent."

A. Cognizable "Claim" Under the False Claims Act

Lincoln argues Relators fail to allege a cognizable cause of action under the False Claims Act.

A "claim" in the False Claims Act context consists of a request or demand on the government for money that induces the government to disburse funds or "otherwise suffer immediate financial detriment." *United States v. McNinch*, 356 U.S. 595, 599, 2 L. Ed. 2d 1001, 78 S. Ct. 950 (1958). Unless this element is present, actions do not constitute a cognizable false claims cause of action even if they involve "false" statements or unlawful conduct. *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998).

The Relators' Complaint contains general and conclusory allegations that Lincoln submitted claims for student financial aid under Title IV, but it fails to provide the requisite particulars. Rather than describing any specific request or demand by Lincoln on the government for money, Relators provide only a generic description of Lincoln's program procedures in HEA student loan programs.

Even if Relators had alleged sufficient facts, they would have still failed to state a cognizable claim under the False Claims Act. Relators alleged two categories of payments in this case: guaranteed loans and direct student grants. VUnder the Federal Family Education Loan Program ("FFELP"), a participating institution that has entered into an Agreement, such as Lincoln, and an eligible student submit an application to a private lender for a loan on behalf of that student. The lender, typically a bank, issues a check for tuition, made payable to both the student and the institution. The DOE subsidizes interest payments on the loans while the student is actively enrolled in classes and during certain

grace periods. State agencies or nonprofit organizations act as guaranteeing agencies for the loans, and the DOE subsidizes and reinsures them. If the student does not repay the loans, the guaranteeing agency reimburses the lender for the balance and attempts to collect the unpaid amount. If the agency fails to collect the money, the DOE reimburses the guaranteeing agency for the loss or accepts assignment of the loan. 20 U.S.C. § 1078(c)(1)(A); 34 C.F.R. §§ 682.400(b)(3), 682.404, 682.409(a)(1). Under the FFELP, Lincoln does not receive government funds when the loan is made. Nor does it receive government funds if a default occurs. Furthermore, the demand for payment from the government comes from the guaranteeing agency or organization, not Lincoln. A claim regarding these student loans has, therefore, not been made. See United States v. Rivera, 55 F.3d 703, 710 (1st Cir. 1995) (when government-insured loan, claim cognizable under False Claims Act only when borrower defaults and government must make payment).

Relators also allege Lincoln received federal money through the federal Pell Grant Program. A participating school under an Agreement may request money from the DOE as federal grants for eligible students. The money is held in an institutional account to be dispersed to the eligible students. A student prepares an application for a Pell Grant which is submitted to the DOE either directly by the student or through the school. While there is little case law addressing this issue, it appears Pell Grant applications may be a "claim" under the False Claims Act as to the educational institution as well as the student. *See United States v. St. Augustine College*, 1991 WL 222099, at *4-5 (N.D. Ill. June 5, 2002). However, Relators have failed to offer any evidence that the information on the student applications or requests were false or contained false statements. Therefore, Relators have not made a claim in the context of the False Claims Act for the student grants either.

B. False Claims

Even if a claim in the context of the False Claims Act had been alleged, Relators would have failed to allege a claim viable under the Act. In an attempt to establish the falsity of the claims,

Relators assert Lincoln: (1) implied its certification with applicable statutes and regulations; (2) falsely certified its compliance in the assertion letters; and (3) committed fraud in the inducement.

1. Implied and Express False Certification of Compliance

Relators contend that by entering into the Agreements, Lincoln implied it would abide by and was abiding by the regulations of the HEA, even though Lincoln was violating HEA by directly tying salaries to enrollment quotas. Relators also contend Lincoln expressly falsely certified its compliance, past, present, and future, in the required assertion letters it sent under HEA.

The "false certification theory" of False Claims Act liability is predicated on false certification of compliance with a federal statute, regulation, or contractual term that is a prerequisite to obtaining a government benefit. The Fifth Circuit has identified the two elements necessary to state a false certification cause of action: (1) defendant makes a knowingly false certification of compliance with a statute or regulation; and (2) the certification is a prerequisite to payment. *United States v. Southland Management Corp.*, 288 F.3d 665, 679 (5th Cir. 2002), *reh'gen banc granted*, 307 F.3d 352 (5th Cir. 2002). The Fifth Circuit has not addressed whether it will recognize the "implied certification theory." *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 382 (5th Cir. 2003). However, as this Court previously recognized, under either implied or express certification theories, the certification must be a prerequisite to receive the government benefit in order to be legally false. *United States ex rel. Coppock v. Northrup Grumman Corp.*, 2003 U.S. Dist. LEXIS 25979, 2003 WL 21730668, at *11 (N.D. Tex. July 22, 2003); *see United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (claim under False Claims Act "legally false" only where party affirmatively certifies compliance with statute or regulation as condition to receiving governmental payment or property).

Relators fail to establish the first element that Lincoln made a knowingly false certification of compliance with a statute or regulation. The record does not establish that by entering into the

Agreements, Lincoln impliedly certified compliance. Furthermore, the record does not establish that Lincoln expressly certified its compliance in the assertion letters. Therefore, these two claims fail from the beginning. *See Southland Management Corp.*, 288 F.3d at 679. However, even if the first element had been met, the claims would still fail. The crucial question is whether the certification of compliance with a particular regulation or statute was a condition for payment by the government. *See id.; Thompson*, 125 F.3d at 902-903. Relators present nothing establishing that Lincoln made a false certification of compliance, either implied or express, as a condition of payment. See Thompson, 125 F.3d at 902-903 (no liability under False Claims Act unless certification prerequisite to payment). Therefore, Relators' claims for implied and express false certification fail.

2. *Fraud in the Inducement*

Relators assert a cause of action against Lincoln for fraud in the inducement, contending Lincoln knowingly entered into the Agreements with no intention of complying with the statutory requirements.

A claim of fraud in the inducement requires more than an allegation that a defendant accepted federal funds while in violation of certain funding program requirements. In cases involving a claim of fraud in the inducement under the False Claims Act, courts have found liability for claims submitted to the government under a contract if it was obtained originally by false statements or fraudulent conduct. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-43, 87 L. Ed. 443, 63 S. Ct. 379 (1943); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999) *(citing McNinch*, 356 U.S. at 599).

Relators make a bare assertion that when Lincoln entered into the Agreements, it had no intention of complying with the provision on incentive compensation. However, Relators fail to provide any facts supporting this claim. Instead, Relators simply argue that relevant intent may be inferred because Lincoln's continuing practices were inconsistent with the guarantees made

in the Agreements. However, the mere fact of nonperformance does not state a claim for fraudulent inducement. *United States v. Shah*, 44 F.3d 285, 293 n.14 (5th Cir. 1995) (no inference of fraudulent intent not to perform from mere fact that promise made subsequently not performed). There must be some evidence or allegations that Lincoln intended to violate the provisions of the Agreements at the time they were entered. Relators failed to allege facts suggesting that, at the time Lincoln entered into the Agreements Lincoln had the requisite intent to fraudulently induce the government to permit it to receive the student financial aid funds. *See Marcus*, 317 U.S. at 542-43. This claim also fails.

C. Violation of Section 3729(a)(7)

Relators also allege Lincoln violated section 3729(a)(7) of the False Claims Act, sometimes referred to as "reverse false claim." A violation under section 3729(a)(7) imposes liability on one who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729 (a)(7). A claim can arise under section 3729(a)(7) only where the defendant owes a payment or obligation to the government and submits a false claim or statement to avoid that payment obligation. *See United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 2003 WL 21921108, at *2 (5th Cir. 2003). Relators fail to provide any facts establishing Lincoln owed a duty or obligation to pay money to the Government. See id. This claim also fails.

IV. Conclusion

For the reasons stated above, Defendant's Motion to Dismiss the First Amended Complaint is **GRANTED**. This Court agrees this entire action should be dismissed for failure to state a claim upon which relief can be granted under the False Claims Act. This case is **DISMISSED WITH PREJUDICE**..

SO ORDERED.

September 3rd, 2003.

/s/

ED KINKEADE
UNITED STATES DISTRICT JUDGE

§ 3729. False claims

(a) Liability for certain acts

Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no
criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 USCS 3729.